



George C. Paine, II
US Bankruptcy Judge
Dated: 10/01/09



**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE**

In Re:

SPENCER MILL CONSTRUCTION, LLC
Debtor.

FIRST STATE BANK
Movant

v.

SPENCER MILL CONSTRUCTION, LLC
Respondent

CASE NO. 309-07938
CHAPTER 11
JUDGE GEORGE C. PAINE, II

MEMORANDUM

This matter is before the court on First State Bank's Motion for Relief from the Automatic Stay to pursue their rights under state law with respect to a perfected lien in two Terex Model TA 30 Arctic Trucks. For the reasons stated herein, the court grants First State's Motion for Relief.

On August 2, 2007 First State Bank made a loan to Justin A. Cutler and Ellen F. Cutler in the original amount of \$202,000.00. The proceeds of the loan between First State Bank and Justin and Ellen Cutler were used to purchase two (2) 2002 Terex Model TA 30 Arctic trucks (Serial #'s – A7991575 & A7991590). According to the testimony of Benny Spencer, (an owner of the debtor), the Cutlers wanted Spencer Mill Construction LLC (hereinafter "Spencer Mill" or "debtor") to purchase the trucks in order to speed up

production time for a project the debtor was working on for the Cutlers. Mr. Spencer went to Atlanta and found the two trucks. At that point, the Cutlers borrowed money from First State Bank to buy the trucks which became subject to a perfected security interest in favor of First State Bank. The current outstanding payoff balance due and owing on the subject loan as of September 25, 2009 is \$113,038.33 plus costs and attorney's fees.

After purchasing the trucks, the Cutlers, according to Ellen Cutler, made a capital contribution in the form of the two trucks to their solely owned corporation, called Umbrella Investment Corporation ("Umbrella"). After contributing First State Bank's collateral to Umbrella, apparently without the Bank's knowledge, Umbrella entered into Purchase Option Contract with Spencer Mill. That agreement provided that Spencer Mill had the option to purchase the two trucks at the conclusion of three years of payments of \$7,500.00 per month for \$20,180.00.

The loan between First State Bank and Justin and Ellen Cutler is in default. Prior to Spencer Mill's bankruptcy, First State filed a lawsuit in state court seeking to obtain recovery of their collateral. First State Bank now seeks to enforce its perfected lien in the two trucks against the Cutlers by getting stay relief in the Spencer Mill bankruptcy. Spencer Mill claims that it is the owner of the trucks, and First State Bank is prohibited by the automatic stay from exercising any rights against the two trucks.

The court finds that the documents, testimony, and all other proof in this case show that First State Bank is entitled to relief from the automatic stay. First State Bank has a Security Agreement dated August 2, 2007, a Note

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of the same date, an August 7, 2007 UCC Statement, and proof of the wire transfer of the money paying for the trucks all supporting their perfected lien in the two trucks purchased, not by Spencer Mill, but by Ellen and Justin Cutler. Mrs. Cutler testified that she and Justin Cutler made a capital contribution of the trucks to Umbrella. Umbrella, through its owners, Ellen and Justin Cutler, then made an agreement with Spencer Mill about a lease/purchase of the trucks, but the agreement makes no reference to First State Bank's perfected lien. Mr. Spencer's testimony at the Meeting of Creditors admits that Justin Cutler paid for the trucks, and that Justin then drew up papers for a lease purchase option for Spencer Mill. Mr. Spencer thought he owned the trucks under the Option Agreement. He did not.

First State took a security interest in collateral purchased by non-debtors, the Cutlers, and any subsequent act by the Cutlers to convey the collateral did not defeat that perfected lien. In truth, First State Bank does not need stay relief because the debtor in this case, Spencer Mill, is not the owner of the trucks. The Cutlers, who are non-debtors, own the trucks subject to First State Bank's security interest.

Accordingly, the court finds that to the extent stay relief is necessary, First State Bank's Motion for Relief from the Automatic Stay as to the two trucks is hereby GRANTED. Counsel for First State Bank is instructed to prepare an Order not inconsistent with this Memorandum and submit it to the court for entry.

**THIS ORDER WAS SIGNED AND ENTERED ELECTRONICALLY
AS INDICATED AT THE TOP OF THE FIRST PAGE.**

3-U.S. Bankruptcy Court, M.D. Tenn.

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This Order has Been electronically
signed. The Judge's signature and
Court's seal appear at the top of the
first page.
United States Bankruptcy Court.